JD(SF)–47–13
Albuquerque, New Mexico

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES–SAN FRANCISCO BRANCH OFFICE

ALBERSTON'S, LLC

and Case 28-CA-023387

YVONNE MARTINEZ, an Individual

and Case 28-CA-023538

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 1564

David Garza and Sophia Alonso, Attys.
for the Acting General Counsel

Thomas Stahl, Glenn Beard, and Jeffrey Lowry, Attys.
(*Rodey, Dickason, Sloan, Akin & Robb, PA*)
for Albertson's, LLC.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. On July 2, 2013, the Board issued a Decision and Order Remanding in this matter. This supplemental decision pertains to the Order Remanding portion. That order severed paragraph 5(k) of the consolidated complaint that issued on August 16, 2011, from the remainer of the case and remanded it to me for the purpose of making findings of fact and conclusions of law. Specifically, Board's July 2 Order states:

> The Acting General Counsel excepts to the judge's finding that his posthearing brief did not address par. 5(k) of the complaint and to the judge's consequent failure to rule on the allegation that "on or about May 7, 2011, the Respondent . . . orally promulgated and has since maintained an overly-broad and discriminatory rule prohibiting employees from engaging in Union activities." We find merit in this exception.
>
> The Acting General Counsel's brief to the judge addressed this allegation in Section III.A.(f) and Section IV.H.(a). Relying on the testimony of employee Perea, the Acting General Counsel argued that Store Director Don Merritt violated Sec. 8(a)(1) of the Act by orally imposing a "no-talking" rule during a conversation with Perea that had

the effect of prohibiting her and other employees who worked at the frontend section of the store from discussing the Union. Merritt denied imposing such a rule.

Because the judge failed to address this allegation, the resolution of which turns on credibility determinations that he must make in the first instance, we shall sever this allegation and remand it to the judge to make the necessary credibility resolutions and determine whether an 8(a)(1) violation has been established.

In my original decision, I included this allegation with others I had concluded should be dismissed because I had not perceived any evidence in support of the claim made in the Acting General Counsel's complaint 5(k) that the Respondent, a corporate entity, had orally imposed any rule "prohibiting employees from engaging in union activities."

The Board's remand did not authorize further hearing or argument. Now that it is clear what this allegation is about I will proceed to make the appropriate factual and legal conclusions based on the record already made and the arguments already presented.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs previously filed by the Acting General Counsel and Respondent, I make the following

SUPPLEMENTAL FINDINGS OF FACT

When cashiers at store 917 are not directly engaged in checking out customers, they are expected to maintain the area around their check-out counters and otherwise remain nearby to signal customers that their isle is open and that they are available. During these periods, adjacent cashiers often talk with one another about a whole variety of subjects. Store Manager Merritt observed this practice at the time he became the store 917 manager in January 2010 but did nothing to interfere unless several cashiers congregated together at one location away from their check-out register to talk, a practice that he labeled as a "picnic." Even before the union organizing began, Merritt began directing employees to get back to work whenever he observed a so-called picnic going on. He also instructed the other managers to break up picnics whenever they happen to observe one in progress. But otherwise, Merritt acknowledged the front-end employees have personal conversations with each other when not waiting on customers and admitted that he too engages the workers personally when he is in that area.

After the organizing started, the cashiers also spoke to each other during customer lulls about the union and its organizing activities but would generally drop that topic if one of the managers approached. Ordinarily these employee exchanges rarely dealt with store operations; instead, the absence of customers provided the frontend employees interludes that permitted them to chat with each other about matters of personal interest. The preponderance of the evidence shows that brief, casual conversations between employees while engaged in their ancillary work in the area of their stations continued to occur without restriction after the union organizing began originally in 2010 and when it resumed in the spring of 2011.

But this allegation seemingly has to do with the more personalized engagements that Perea and assistant front-end manager Alice Andrick had at work. They frequently spoke to each

other both while at work in the store and outside work. Although they both shared a dislike for Merritt's management style, Andrick did not share Perea's belief that the employees needed to unionize in order to counter Merritt's style. According to Perea's hearsay testimony, by May 2011, Merritt began pressuring Andrick about "gossiping" too much with Perea at the front end of the store. Andrick, Perea said, spoke to her several times about Merritt's belief that she gossiped too much with Perea in the front-end area.

Section III.A.(f) of the Acting General Counsel's posthearing brief cited in the remand order pertains to a remark Merritt allegedly made to Perea when she met with him and angrily protested what she perceived as mistreatment by Cindy Andablo, the front-end manager at the time, over scheduling issues. As it is this alleged remark by Merritt that forms the basis for the Acting General Counsel's allegation in complaint paragraph 5(k), the following account by Perea of their exchange is obviously of great significance:

> Q Can you tell us what was said in the conversation by Mr. Merritt, and -- tell us what was said?
>
> A Well, the first conversation I had explained to him about my schedule. That was going into my schedule. I had told him that -- I had came (sic) in. I covered shifts for Lori and Tomasita. I explained to him the whole thing I just told you about how Cindy reacted to me, and Okay, well, (Merritt said) (")I'll talk to her; I'll talk to her.(")
>
> And I said, (")You're going to talk to her(?") I said, (")She's going to retaliate against me with my schedule. I said, She's going to put me to close (the store at night), I said, and she's going to make my life a living hell, and you know she is, Don.(") Those were my exact words to him. And --
>
> Q Did you say anything to him about how you were going -- how your shift was being treated?
>
> A Yes. I told him how Cindy was, how she was telling me down there, and I told him, I said, (")I'm doing you guys the favor of coming in and helping.(") I said, (")She (Andablo) was not here, so Alice and Jeromy were the ones, the managers present that day. (T)hey're the ones that approved my shift change. They're the ones who asked me to work. I didn't go to them and ask them to work. They asked me to work. I told Don, and I said -- I told him about the retaliating.
>
> And then at the end of our conversation, he just said, (")Oh, and this gossiping thing on the front end,(") he goes, (")I just -- this no talking,(") he goes, (")I just want you to know it's coming down from me, because I'm seeing too much of it downstairs.(") And I was like, (")Okay, whatever,(") and I just walked out of the conversation. I didn't respond to it, because I was mad about my schedule at that time for the way Cindy was treating me.
>
> Q Did he say anything else besides the no-talking comment?
>
> A No.
>
> Q Did he say anything about his observations of the cashiers at the front end?
>
> A He just said that he was seeing too much . . . talking going on.

[Tr. 814-815[1]]

[1] The punctuation inserted in parenthesis is implied from the content of Perea's testimony.

Merritt remembered meeting with Perea in early May about the scheduling dispute she had with Andablo and resolving the problem largely in Perea's favor. He did not specifically deny he brought of the issue of "gossiping" during this conversation but he specifically denied that he ever told the frontend or any other employees that they were not allowed to talk or that he ever instructed any of the store's management personnel, including Andrick (whom I found to be Respondent's agent in my original decision) to tell employees they were not allowed to talk or that there was a "no-talking" rule in effect at the frontend. He further denied the Company maintained a no-talking policy. [Tr. 1477-79]

ANALYSIS AND CONCLUSIONS

Although I find it somewhat more likely than not that Merritt may have offhandedly referred to "gossiping" at the end of his conversation with Perea, I reject the Acting General Counsel's strained contention that this brief reference would have somehow constituted a workplace rule that violated the Act because it interfered with employee Section 7 activity.

As noted in my original decision, workplace rules that chill employee Section 7 activities violate Section 8)(a)(1). *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998). Under the analytical framework in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), rules that explicitly restrict Section 7 activities maybe found unlawful on their face. But where a rule does not explicitly restrict Section 7 activity, the General Counsel must establish by a preponderance of the evidence that: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the employer adopted the rule in response to union activity; or (3) the employer applied a rule to restrict employee Section 7 activity. Id. at 647. In assessing the lawfulness of a rule, fact finders must give the disputed rule a reasonable reading, refrain from reading particular phrases in isolation, and avoid improper presumptions about interference with employee rights. Id. at 646.

Perea's account of her conversation with Merritt contains no evidence of a rule that explicitly restricts Section 7 activity within the meaning of the *Lutheran Heritage* criteria. Nor did the Acting General Counsel adduce evidence to establish that employees would reasonably construe his gossiping remark to prohibit Section 7 activity, or that Merritt made the remark in response to ongoing union activity, or that he sought to curb the gossiping that he might have believed to be going on between company agent Andrick and Perea in order to restrict employee Section 7 activity. Quite to the contrary, there is ample evidence that Merritt and others in the management heirachy encouraged low-level supervisors and agents to report information they acquired from employees about the organizing activity.

Much of the context for any discussion of Merritt's reaction to "gossiping" rests largely with Perea's considerable hearsay testimony on the subject. Parsing even Perea's account about Merritt's "gossiping" / "no talking" remark, I find it unclear as to whether Merritt is telling Perea that there is to be no gossiping as the Acting General Counsel asserts or whether he is merely taking responsibility for the crackdown on the excessive gossiping that he perceived to be going on between Andrick and Perea during their work time. Regardless, I find no basis to find Merritt's comment, if it really occurred at all, amounted to an attempt on his part to slip in at the last second of this exchange about a completely unrelated subject some type of ad hoc "no-talking" rule that violated the Act.

I credit Merritt's assertion that he never sought to prohibit employees from engaging in personal talk while at work about any topic. It is clearly consistent with the record evidence overall. To the extent that the Acting General Counsel is asserting on the basis of Perea's testimony of her conversation with Merritt that he did, absolutely no corroboration was provided that any other employee ever heard about the gossiping remark Perea attributed to him. Similarly, Perea's dismissive "whatever" reaction to the remark provides compelling evidence that she, as the most strident employee organizer at the time, did not construe it as imposing any kind of restriction on employee union activity.

Instead, I find that the remark amounted to, at best, little more than an admonishment that Andrick and Perea spent too much on-the-clock time engaged in idle conversation. Whatever else may be said, this kind of evidence is not even close to the wherewithal required to meet the Acting General Counsel's burden of proof in a case of this type. This is especially true, where as here, I found in my original decision that the Company maintains a laborious, horizontal/vertical process for establishing rules governing employee conduct, as well as a well-known process for employees to complain about unfair treatment. Until the Acting General Counsel connected this issue with the Section 7 activity, Perea provided no hint that she objected to Merritt's antagonism toward her on-the-job conversations ("gossiping") with Andrick on any basis other than the fact that it interfered with their longstanding personal relationship they enjoyed for years prior to his arrival as the manager of store 917. Accordingly, my recommended order will provide for the dismissal of complaint paragraph 5(k).

CONCLUSIONS OF LAW

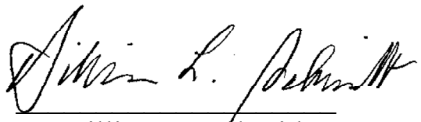
The Acting General Counsel failed to prove by a preponderance of the evidence that Respondent orally promulgated or maintained an overly-broad and discriminatory rule prohibiting employees from engaging in Union activities as alleged in complaint paragraph 5(k).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

Complaint paragraph 5(k) is dismissed.

Dated, Washington, D.C. September 26, 2013



William L. Schmidt
Administrative Law Judge

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.